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In The
Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL.,
Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And The Tenth Circuits

BRIEF OF *AMICI CURIAE* AZUSA PACIFIC UNIVERSITY, ALLIANCE DEVELOPMENT FUND, BETHANY INTERNATIONAL, BIBLICA US, INC., BILLY GRAHAM EVANGELISTIC ASSOCIATION, COMPASSION INTERNATIONAL, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, FELLOWSHIP OF CATHOLIC UNIVERSITY STUDENTS, FELLOWSHIP OF CHRISTIAN ATHLETES, MARILYN HICKEY MINISTRIES, NEW TRIBES MISSION, ONE CHILD MATTERS, PINE COVE, POINT LOMA NAZARENE UNIVERSITY, REACH BEYOND, SAMARITAN'S PURSE, SIMPSON UNIVERSITY, SKY RANCH, SUMMIT MINISTRIES, THE CHRISTIAN & MISSIONARY ALLIANCE, THE NAVIGATORS, WATERSTONE, YOUNG LIFE AND UPWARD UNLIMITED IN SUPPORT OF NEITHER PARTY

STUART J. LARK
Counsel of Record

Attorney for Amici Curiae

BRYAN CAVE LLP
90 S. Cascade Ave., Suite 1300
Colorado Springs, CO 80903
(719) 473-3800
stuart.lark@bryancave.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 9

ARGUMENT 14

I. Religious exercise includes a wide range of activities or policies that further an organization's sincerely held religious beliefs 16

A. Organizations exercise religious beliefs through many types of practices 16

B. An activity or policy of an organization constitutes religious exercise if it furthers religious beliefs sincerely held by the organization 19

II. Imposing additional limitations on religious exercise denigrates religious liberty 21

A. Limiting religious exercise to activities perceived to be religious violates constitutional principles of deference and neutrality 22

B. Limiting religious exercise to exclusively religious activities improperly confines religion to the margins of civil society 27

TABLE OF CONTENTS – Continued

Page

C. Limiting religious exercise to non-profit corporations fundamentally misconceives the distinction between corporate forms 30

III. The Coverage Mandate is subject to and does not survive the rigorous strict scrutiny standards designed to protect religious liberty 33

A. The Coverage Mandate is subject to strict scrutiny under RFRA because it substantially burdens religious exercise 33

B. Because the Coverage Mandate is not generally applicable, it must survive strict scrutiny under the *Free Exercise Clause* 36

C. The Coverage Mandate is not the least restrictive means of furthering any compelling governmental interests 38

CONCLUSION 41

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).....*passim*

Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987).....18, 23, 30, 35

Employment Division v. Smith, 494 U.S. 872 (1990).....11, 25

Fowler v. Rhode Island, 345 U.S. 67 (1953) 26, 27

Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).....37

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).....11, 39

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012) ...*passim*

Larson v. Valente, 456 U.S. 228 (1982) 40

Leboon v. Lancaster Jewish Community Center Ass'n, 503 F.3d 217 (3d Cir. 2007) 20, 28

New York v. Cathedral Academy, 434 U.S. 125 (1977).....23

Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996).....37

Sherbert v. Verner, 374 U.S. 398 (1963).....40

U.S. v. Ballard, 322 U.S. 78 (1944).....21

University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002).....24, 25, 28

TABLE OF AUTHORITIES – Continued

Page

Werner v. McCotter, 49 F.3d 1476 (10th Cir. 1995) 40

Widmar v. Vincent, 454 U.S. 263 (1981) 20, 24, 26

Wisconsin v. Yoder, 406 U.S. 205 (1972) 18, 40, 41

FEDERAL CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const., amend. I .....*passim*

26 U.S.C. § 501(c)(3) 20

26 U.S.C. §§ 1402(g)(1), 5000A(d)(2)(A) and (B).....37

26 U.S.C. § 3309(b) 20

26 U.S.C. § 6033(a)(3)(A)(i) and (iii) 10

42 U.S.C. § 300gg-13 10

42 U.S.C. § 2000bb 10, 11, 33

42 U.S.C. § 2000e-2(e) 31

42 U.S.C. § 18011.....37

45 C.F.R. § 147.130(a)(i)(iv).....10

45 C.F.R. § 147.131(a), (b) 10

STATE CASES

Maurer v. Young Life, 774 P.2d 1317 (Colo. 1989) 29

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

Colorado Revised Statutes § 31-3-106(2) 20

Va. Code Ann. § 57-1 (West 2003) 15

MISCELLANEOUS

About Us, *available at* http://www.samaritanspurse.org/our-ministry/about-us (last visited Jan. 22, 2014) 17

Mission Statement, *available at* http://www.compassion.com/mission-statement.htm (last visited Jan. 22, 2014) 17

Bruce R. Hopkins, *The Law of Tax-Exempt Organizations*, § 1.1, Tenth Edition, 2011, John Wiley & Sons, Inc. 32

Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law. 25, 35-36 (2000) 37

James Madison, *Memorial and Remonstrance Against Religious Assessments, reprinted in Everson v. Board of Education of Ewing,* 330 U.S. 1, 64 (1947) (appendix to dissenting opinion of Rutledge, J.) 14, 15

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici constitute a diverse group of religious ministry organizations and collectively they conduct many different types of activities including humanitarian relief, community development, camping, education in "arts and sciences" at all levels, church construction financing, financial standards accreditation, congregational care, foreign missions and training in religious texts and religious living. *Amici* conduct all of their activities in furtherance of their respective Christian missions and in a manner that distinctly expresses and exercises their religious convictions. In doing so, they operate under a variety of legal structures, including for-profit subsidiaries or affiliates.

As social or commercial legislation expands in scope, *amici* increasingly rely upon religious exemptions to conduct their activities in a manner consistent with their distinct religious convictions. *Amici* have a direct interest in how this Court characterizes the applicable religious liberty and governmental interests in this consolidated case, not least because many if not all of the *amici* hold religious beliefs

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

regarding contraceptives (including those used to induce abortions) similar to the beliefs at issue in this case. In addition, this Court's analysis will likely establish a framework for religious exemptions in other areas of the law. Adopting a narrow construction of religious exercise or granting too much deference to governmental interests would undermine this country's defining commitment to religious liberty and severely impair the ability of *amici* to accomplish their missions while preserving their character.

Therefore, *amici* urge this Court to affirm and apply broad religious exemptions based on constitutional principles of religious deference and neutrality. These principles dictate deferential standards for determining when laws burden religious exercise, and rigorous standards of strict scrutiny to justify such laws.

The religious character and mission of the *amici* are as follows.

Azusa Pacific University ("APU") is a comprehensive, evangelical, Christian university located near Los Angeles, California. APU is committed to God First and excellence in higher education. APU serves more than 10,000 students on campus, online and at seven regional centers, offering more than 100 associate's, bachelor's, master's and doctoral programs.

Alliance Development Fund is a corporate subsidiary of The Christian and Missionary Alliance formed to provide construction loans and other financial

services for member churches of the denomination. In so doing, the organization advances the mission of transforming people's lives through local Alliance churches.

Bethany International is a Christian missions training and sending organization dedicated to mobilizing disciples of Jesus and the church worldwide for the increase of God's Kingdom. Bethany's graduates have served as missionaries, planted churches, founded Christian bookstores and literature distribution networks, trained church and mission leaders, and partnered with national ministries in more than 50 countries.

Biblica US, Inc. is a Christian organization founded in 1809 that translates and publishes the Bible in more than 100 languages. Biblica serves in over 50 countries around the world focusing on translation, children and youth ministry, specialized ministry outreach, Bible and church engagement and scripture outreach. Based in Colorado Springs, Biblica currently has approximately 900 employees worldwide, including translators, ministry program personnel, fulfillment staff and administrative staff.

Billy Graham Evangelistic Association ("BGEA") was founded by Billy Graham in 1950 to proclaim the Gospel of Jesus Christ by every effective means and to equip others to do the same. BGEA ministers to people around the world through a variety of activities including festivals and celebrations, television and internet evangelism, and the

Billy Graham Library. BGEA has over 850 employees and over 50,000 volunteers.

Compassion International is a Christian child advocacy ministry that, in response to Christ's instructions to his followers, releases children from their spiritual, economic, social and physical poverty and enables them to become responsible and fulfilled Christian adults. Based in Colorado Springs, Compassion and its member churches provide regular support to more than one million children in over 24 countries.

Evangelical Council for Financial Accountability ("ECFA") provides accreditation to leading Christian nonprofit organizations that faithfully demonstrate compliance with established standards for financial accountability, fundraising and board governance. ECFA members include Christian ministries, denominations, churches, educational institutions and other tax-exempt 501(c)(3) organizations. ECFA has approximately 1,800 member organizations.

Fellowship of Catholic University Students ("FOCUS") is a national outreach that meets college students where they are and invites them into a growing relationship with Jesus Christ and the Catholic faith. Over the past 15 years, FOCUS has grown from four missionaries serving one campus to over 350 missionaries serving 83 campuses in 34 states across the nation.

Fellowship of Christian Athletes ("FCA") is a Christian organization that has been challenging coaches and athletes on the professional, college, high school, junior high and youth levels to use the powerful medium of athletics to impact the world for Jesus Christ since 1954. FCA's mission is to present to coaches and athletes, and all whom they influence, the challenge and adventure of receiving Jesus Christ as Savior and Lord, serving Him in their relationships and in the fellowship of the church.

Marilyn Hickey Ministries is a Christian organization that is sending a clear message of love, hope and healing to people around the world through Bible teaching, international healing meetings, group ministry tours, pastors' and leaders' conferences, humanitarian efforts, and a daily television program. Marilyn Hickey has ministered in nearly 130 countries around the world.

New Tribes Mission ("NTM") and its more than 3,000 missionaries start tribal churches among people who have no concept of the God of the Bible. Based in Sanford, Florida, NTM missionaries in over 20 countries seek to establish mature churches that can take their rightful place as agents of change in their own communities and partners in the Great Commission of Jesus Christ.

One Child Matters is an international child development ministry that seeks to demonstrate the love of Jesus to children in poverty by meeting their basic needs and providing opportunities for development

and growth. One Child Matters is working in 16 countries in the world, bringing hope, truth, life, love, and mercy to more than 40,000 children through child sponsorship.

Pine Cove offers Christian camping programs and facilities year round in Texas and other states. Pine Cove serves children, youth, and families each summer, and provides outdoor education, retreats and conferences in other seasons, accommodating over 20,000 visitors each year. Pine Cove employs over 160 full-time and part-time resident staff, and over 1,500 college-age staff work at the camps every summer.

Point Loma Nazarene University ("PLNU") is a Christian liberal arts college based near San Diego and founded in 1902 as a Bible college by the Church of the Nazarene. PLNU serves more than 3,500 students in more than 60 undergraduate areas of study and graduate programs. PLNU offers many ministry opportunities, including chapel, community and discipleship ministries, international and worship ministries.

Reach Beyond is an evangelical missionary organization, that assists its partners with staff, training, funding and technology. Since its founding in 1931, Reach Beyond has been using new technologies in mass media as an effective, efficient way of reaching into people's homes – touching hearts and changing lives. Reach Beyond provides a wide variety of programs including sports, preventative healthcare,

culture, travel and music, airing via shortwave, AM, FM, satellite, Internet, chat rooms or SMS messaging.

Samaritan's Purse is a nondenominational evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ.

Simpson University is a Christian University of liberal arts and professional studies based in Redding, California. Simpson offers undergraduate, graduate and teaching credential programs in a Christ-centered learning community committed to developing each student in mind, faith and character for a lifetime of meaningful work and service in a constantly changing world. Simpson students are associated with more than 30 different denominations and represent a mix of ethnic backgrounds.

Sky Ranch is a Christian organization providing an outdoor ministry with a mission to facilitate an encounter with Christ on the mountaintops. Its vision of outdoor ministry is to unleash a spirit-driven community that is transforming hope in the world. Sky Ranch seeks to plant the seed of faith in its campers and other program participants to equip

them with a better understanding of the Bible and of their vocation, and with the skills for congregation ministry leadership.

Summit Ministries is an evangelical, nondenominational Christian ministry. Summit is viewed as one of the foremost leaders in training Christians in apologetics, worldview analysis, and social engagement. Currently, about 1,500 students graduate from Summit each year.

The Christian & Missionary Alliance is a church denomination and missionary organization with over 400,000 members in over 2,000 churches in all 50 states. In addition, there are over 800 missionaries in 58 nations supported by the organization. Based in Colorado Springs, the organization also sponsors a number of educational institutions and retirement centers around the country.

The Navigators is an international, Christian ministry established in 1933. The Navigators are characterized by an eagerness to introduce Jesus to those who don't know Him, a passion to see those who do know Jesus deepen their relationship with Him, and a commitment to training Jesus' followers to continue this nurturing process among the people they know. Based in Colorado Springs, the Navigator staff family – 4,600 strong – includes 70 nationalities.

WaterStone is a Christian community foundation formed in 1980. The mission of WaterStone is to educate and encourage donors to achieve Christ-centered giving objectives by providing excellence in

innovative, personalized charitable giving solutions and educational resources. By helping individuals and families increase their ability to give to their favorite charities and ministries, WaterStone has become a launching pad for Christian work nationally and internationally.

Young Life is a Christian ministry that reaches out to middle school, high school and college-aged students in all 50 of the United States as well as in more than 90 countries around the world. Young Life's ministries include camping programs around the country and ministries in approximately 6,000 schools. In 2012, the number of children impacted by Young Life in the U.S. and internationally was over 1.2 million.

Upward Unlimited provides the world's largest Christian sports program for children. Each year some one million people around the world play, coach, referee or volunteer in Upward leagues and camps hosted by more than 2,400 churches. These churches have taken Upward programs to 67 countries. Upward Unlimited has its headquarters in Spartanburg, South Carolina.

SUMMARY OF ARGUMENT

In connection with a provision in the Patient Protection and Affordable Care Act, the Secretary of Health and Human Services and other governmental parties in this consolidated case (collectively, the

"Secretary") enacted regulations requiring certain employers to include prescription contraceptives in their health plans (the "Coverage Mandate").[2] 42 U.S.C. § 300gg-13; 45 C.F.R. § 147.130(a)(i)(iv). The corporate employers in this consolidated case assert that the Coverage Mandate requires them to act in violation of their religious beliefs regarding certain contraceptives. As such, they claim that the Coverage Mandate violates the *Free Exercise Clause* of the U.S. Constitution, U.S. Const. amend. I, and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb ("RFRA").

In evaluating claims under the *Free Exercise Clause*, this Court has adopted the rule that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi*

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[2] The Secretary also enacted regulations to provide an exemption for organizations described in Internal Revenue Code § 6033(a)(3)(A)(i) and (iii), which sections describe organizations treated for tax purposes as churches or their integrated auxiliaries or the exclusively religious activities of religious orders. The Secretary labels this exemption as the "religious employer" exemption even though it does not include most non-church religious organizations. For certain nonprofit, non-church religious organizations (labeled as "eligible" organizations), the regulations separately provide a so-called "accommodation." In contrast with the "religious employer" exemption, the "accommodation" uses the healthcare plans of the "eligible" organizations to provide contraceptive coverage for participants in the plans. *See* 45 C.F.R. § 147.131(a), (b).

Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (*citing Employment Division v. Smith,* 494 U.S. 872 (1990)). However, "[a] law *failing to satisfy these requirements* must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi,* 508 U.S. at 531-32 (emphasis added).

RFRA provides even broader religious liberty protection for federal laws, striking down any such law that substantially burdens religious exercise unless the law satisfies the same strict scrutiny standards. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006) ("The only exception recognized by the statute requires the Government to satisfy the compelling interest test – to demonstrate that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

Within this legal framework, this consolidated case asks the following questions related to the impact of the Coverage Mandate on religious exercise:

1. What are the defining characteristics of the religious exercise protected by the *Free Exercise Clause* and RFRA?

2. Does the Coverage Mandate substantially burden religious exercise?

3. Is the Coverage Mandate a generally applicable law?

4. Does the Coverage Mandate satisfy strict scrutiny standards (*i.e.*, is it narrowly tailored to, or the least restrictive means of furthering, a compelling governmental interest)?

With respect to the first question, constitutional principles of religious deference and neutrality dictate a deferential definition of religious exercise that encompasses all activities and policies of an organization that are based on or further the organization's sincerely held religious beliefs. In determining whether an organization is asserting religious beliefs sincerely or as a sham, government officials may consider a wide range of potentially relevant factors. They may, for instance, consider whether an organization has consistently asserted that it is taking actions in accordance with religious beliefs.

But government officials have no constitutional competence or authority to measure the religious exercise in an organization's activities based on some litmus test of perceived religious content, or on whether they align with the organization's religious beliefs. In addition, government officials cannot exclude from religious exercise certain activities or policies that are based on sincerely held religious beliefs merely because such activities or policies appear to be too secular, too commercial, or too public, or because they are conducted by a for-profit corporation. These limitations simply ignore and effectively marginalize the wide diversity of religious beliefs and activities in this country.

In addition, the Secretary's proposed blanket rule that for-profit corporations cannot exercise religion fundamentally misconceives the distinction in corporate law between nonprofit and for-profit corporations. Many for-profit corporations seek to further sincerely held beliefs or values (some religious and others not). That a corporation may be structured to distribute net earnings to shareholders does not inherently undermine the sincerity with which it holds its beliefs or values.

Most if not all *amici* hold religious beliefs similar to those asserted by the corporate employers in this consolidated case. Although the question of whether the corporate employers sincerely hold such beliefs is a factual matter outside the scope of this brief, *amici* have no reason to doubt that they do. And for purposes of identifying religious exercise, *amici* urge this Court to affirm that this is the only relevant question.

With respect to the substantial burden and generally applicable standards, this Court should apply interpretations deferential to religious liberty interests. Because the Coverage Mandate requires employers to participate through their health plans in providing contraceptives, the mandate substantially burdens the religious exercise of employers who object on religious grounds to the use of contraceptives. Indeed, the Secretary's "religious employer" exemption and "accommodation" concede this point. In addition, this Court should affirm that the generally applicable standard requires more than merely that a law not target religion. The Coverage Mandate's

limited reach and substantial exemptions establish that it is not generally applicable.

Finally, this Court should reject the Secretary's position that the Coverage Mandate is the least restrictive means of furthering compelling governmental interests. The Coverage Mandate cannot satisfy the rigorous strict scrutiny standards articulated by this Court for the same reason that it is not generally applicable. The fact that the Coverage Mandate gives priority to so many other interests concedes that the interests it does serve are not compelling. And given the mere speculation upon which the regulations rely, the Coverage Mandate fails to satisfy the least restrictive means requirement.

ARGUMENT

Religious liberty in this country reflects, among other things, the twin propositions that duty to God transcends duty to society and that true religious faith cannot be coerced. James Madison captured these propositions in his *Memorial and Remonstrance Against Religious Assessments:*

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member

> of Civil Society, he must be considered as a subject of the Governor of the Universe[.]

Id., reprinted in Everson v. Board of Education of Ewing, 330 U.S. 1, 64 (1947) (appendix to dissenting opinion of Rutledge, J.). Thomas Jefferson incorporated the same propositions into the Virginia Act for Religious Freedom, which in its preamble asserts that any attempt by the government to influence the mind through coercion is "a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do. . . ." Va. Code Ann. § 57-1 (West 2003). Because individuals possess an inalienable right and duty to worship God as they deem best, government can have no authority over religious exercise as such. Put differently, civil government is not the highest authority in human affairs.

Building on these propositions, religious liberty principles of deference and neutrality set forth in this Court's decisions establish a deferential definition of religious exercise encompassing all activities or policies grounded in sincerely held religious beliefs. Further, the Coverage Mandate substantially burdens religious exercise by requiring organizations to act in violation of their religious beliefs. Finally, the Coverage Mandate is not generally applicable in any meaningful sense, and it fails to satisfy this Court's rigorous application of strict scrutiny standards.

I. Religious exercise includes a wide range of activities or policies that further an organization's sincerely held religious beliefs.

A. Organizations exercise religious beliefs through many types of practices.

The short descriptions of *amici* in the Statement of Interests section of this brief reveal that *amici*, like many other organizations, engage in a wide variety of activities serving the physical, emotional and spiritual needs of people. A number of organizations, such as Compassion International and Samaritan's Purse, focus on delivering humanitarian relief and basic life sustenance resources and services to the desperately needy. These organizations and others have been on the front lines responding to catastrophic events around the world.

While some organizations serve a range of human needs, others focus on the specific needs of certain social segments. For instance, Upward Unlimited operates youth programs providing recreational opportunities and biblical instruction, and many *amici* provide camping experiences. Azusa Pacific University, Point Loma Nazarene University, and Simpson University are higher educational institutions providing a wide range of degree granting programs. Other *amici* engage in various forms of missionary work, spreading the Christian faith and planting and nurturing local church communities in the U.S. and around the world.

Amici and other organizations view their respective activities, whether serving the poor, providing education, or offering distinctly religious worship or evangelism, both as service to God and as an expression of their religious faith. For example, Compassion International performs humanitarian work in response to the "Great Commission" (Jesus' command to his followers to make disciples). Mission Statement, *available at* http://www.compassion.com/mission-statement.htm (last visited Jan. 22, 2014). Similarly, Samaritan's Purse affirms that its activities are done "with the purpose of sharing God's love through His son, Jesus Christ." About Us, *available at* http://www.samaritanspurse.org/our-ministry/about-us (last visited Jan. 22, 2014).

In carrying out their activities, organizations often adopt operational policies to implement their religious beliefs. Such religious operational policies help these organizations ensure that their activities, some of which may be similar to secular activities, comply with their distinctive religious commitments. The point is not just that services are being provided, but that services are being provided in a manner consistent with their religious beliefs.

This Court has repeatedly recognized that such operational policies, which may encompass, for example, who can conduct certain activities or how activities are to be conducted, are a form of religious exercise. Most recently, this Court held that the *First Amendment* provides a "ministerial exception" that protects organizations from employment discrimination

laws applied to minister employees. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012). Because religious associational policies establishing who may carry out or lead an organization *exercise* religion, this Court affirmed that the *Free Exercise Clause* protects "a religious group's right to shape its own faith and mission through its appointments." *Id.* at 706; *see also Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 341-43 (1987) (Brennan, J., concurring) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.") (internal quotation omitted).

Religious beliefs may determine not only who conducts activities, but also how activities are conducted. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court held that the Amish may educate their children in accordance with their beliefs and contrary to applicable state law. This Court observed that "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith." *Id.* at 210. This Court further noted that the Amish base this concept on "their literal interpretation of the Biblical injunction from the Epistle Of Paul to the Romans, 'be not conformed to this world. . . .'" *Id.* at 216.

Clearly different organizations will reach different conclusions regarding the particular activities and operational requirements that best nurture and carry out the dictates of their faith. Perhaps not many organizations believe the separation requirements apply as broadly as do the Amish. But the important point is that in each case, organizations are exercising religion by engaging in activities or adopting policies based on their religious beliefs. As demonstrated by the numerous challenges to the Contraceptive Mandate (and the "accommodation"), such religious exercise clearly includes policies prohibiting the provision of certain contraceptives in connection with an organization's healthcare plan.

B. An activity or policy of an organization constitutes religious exercise if it furthers religious beliefs sincerely held by the organization.

In determining whether an activity or policy of an organization is religious exercise, the only relevant issue is whether the specific activity or policy furthers a sincerely held religious purpose or belief of the organization. This definition of a religious exercise, based on the religious beliefs or purpose(s) of an organization, is reflected in statutory exemptions. For instance, federal law provides an exemption from unemployment insurance obligations for employers which are "operated primarily for religious purposes."

26 U.S.C. § 3309(b). Similarly, the Internal Revenue Code exempts from income tax organizations which are organized and operated exclusively for religious purposes. 26 U.S.C. § 501(c)(3). Further, the Third Circuit Court of Appeals recently determined that an organization qualified for the Title VII religious employer exemption because its "primary purpose was religious." *Leboon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 231 (3d Cir. 2007); *see also Widmar v. Vincent*, 454 U.S. 263, 271 n.9 (1981) (explaining that the distinction between religious and nonreligious speech is based on the purpose of such speech).[3]

To answer the question of whether the religious beliefs asserted by an organization are sincerely held (and not merely a sham), government officials can and should examine an organization's activities. Government officials may, for instance, inquire into whether the organization has previously asserted religious beliefs. They may also determine whether the organization has taken distinctive action in

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[3] In Colorado, the general assembly expressly affirmed these principles in a statutory finding supporting religious property tax exemptions:

> The general assembly hereby finds and declares religious worship has different meanings to different religious organizations; . . . and that *activities of religious organizations which are in furtherance of their religious purposes constitute religious worship for purposes of* . . . the Colorado constitution.

Colorado Revised Statutes § 31-3-106(2) (emphasis added).

accordance with such beliefs (such as choosing, in contrast with competitors, not to open for business on Sundays). In *U.S. v. Ballard*, 322 U.S. 78 (1944), this Court held that although courts cannot inquire into whether an individual's asserted religious beliefs are true, they can inquire into whether the individual honestly and in good faith actually holds such beliefs. *See also Hosanna-Tabor,* 132 S. Ct. at 711 (Thomas, J., concurring) (concluding that the plaintiff should be treated as a minister because the evidence demonstrated that the church sincerely considered her a minister).

As applied in this consolidated case, the question of whether the policies at issue are based on religious beliefs sincerely held by the corporate employers is a factual matter outside the scope of this brief.[4] But *amici* urge this Court to affirm that this is the only relevant question for purposes of identifying religious exercise.

II. Imposing additional limitations on religious exercise denigrates religious liberty.

The Secretary takes the position that religious exercise must be limited so that it does not include the activities or policies of for-profit corporations. But the reasoning underlying the Secretary's proposed

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[4] *Amici* have no reason to doubt that the corporate employers sincerely hold the asserted religious beliefs, which beliefs are similar to those held by many, if not all, *amici*.

blanket rule – that persons cannot at the same time engage in commercial activity and exercise religion – imposes a government defined orthodoxy that improperly bifurcates the religious and the secular. Government officials have no constitutional competence or authority to navigate this line based on perceived religious content. And by recognizing religious exercise only at the margins of civil society, the Secretary's position disregards the myriad ways in which religious beliefs relate to virtually all aspects of life. Finally, the Secretary's proposed blanket exclusion of for-profit corporations from religious exercise misconceives the distinction in corporate law between nonprofit and for-profit corporations, which distinction has nothing to do with religious exercise.

A. Limiting religious exercise to activities perceived to be religious violates constitutional principles of deference and neutrality.

In determining whether an activity or a policy regarding how an activity is conducted furthers religious purposes, government officials cannot seek to identify those activities that have sufficient religious content or conform to traditional perceptions of religious activity. Doing so draws government officials into making unconstitutional religious determinations and results in favoring certain types of religious exercise over others.

This Court has repeatedly held that government officials have no competence or constitutional authority to interpret or apply religious beliefs, or to determine based on their own standards the religious significance of various activities. In *New York v. Cathedral Academy*, 434 U.S. 125 (1977), for example, this Court struck down a statute which required government officials to "review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities." *Id.* at 132. This Court noted that the requirement would place religious schools "in the position of trying to disprove any religious content in various classroom materials" while at the same time requiring the state "to undertake a *search for religious meaning* in every classroom examination offered in support of a claim." *Id.* at 132-33 (emphasis added).

Ten years later, this Court in *Amos* upheld against an *Establishment Clause* challenge, a religious exemption that applied to all activities of a religious organization, not just its *religious activities.* This Court noted that "Congress' purpose in extending the exemption was to minimize governmental 'interfer[ence] with the decision-making process in religions.'" *Amos*, 483 U.S. at 336. Further, this Court observed that "[t]he line [between religious and secular activities] is hardly a bright one and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Id.* at 336.

This limitation applies not just to distinctions between religious and secular activities, but also to different types of religious activities. In *Widmar v. Vincent*, this Court rejected a proposal to permit students to use buildings at a public university for all religious expressive activities except those constituting "religious worship." 454 U.S. 263, 269 n.6 (1981). This Court observed that the distinction between "religious worship" and other forms of religious expression "[lacked] intelligible content," and that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer." *Id.* Indeed, "[m]erely to draw the distinction would require the [State] – and ultimately the Courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.*; *see also id.* at 272 n.11 (noting the difficulty of determining which words and activities constitute religious worship due to the many and various beliefs that constitute religion).

As another example, the Court of Appeals for the D.C. Circuit struck down a *substantial religious character* test used by the National Labor Relations Board to determine whether it could exercise jurisdiction over a religious organization. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). In evaluating a religious school, for instance, the test required the NLRB to consider "such factors as the

involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty." *Id.* (quotation omitted). The court concluded that because the test "boil[ed] down to '[I]s [an institution] sufficiently religious?'" it was fatally flawed. *Id.* at 1343.

Moreover, the extent of distinctly religious content in a particular activity is not a reliable indicator of the activity's religious character. Bible reading is a religious activity if performed out of a desire to know and obey God, but it is not if performed merely as a study of literature. Eating bread and drinking wine is a religious activity if performed as part of a communion service, but it is not if performed merely to satisfy physical needs or desires. Ingesting peyote and killing chickens are generally not religious activities, but they become so when conducted as a sacrament in certain religions. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). The purpose, not the content, is what matters.

In addition, when government officials seek to determine the religious content in activities or policies, they effectively create an implicit state-defined orthodoxy regarding religious activities and they interfere with the right of religious institutions to determine and apply their own doctrine. *Hosanna-Tabor,* 132 S. Ct. at 710 (Thomas, J, concurring) ("A religious organization's right to choose its ministers

would be hollow, however, if secular courts could second-guess the organization's sincere determination that a given employee is a "minister" under the organization's theological tenets.").

Distinctions based on a court's view of the relative religious significance of various activities inevitably favor expressly religious or conventional methods of accomplishing a religious mission over other more ecumenical or unorthodox methods. In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), this Court struck down a city ordinance that in critical respects was the opposite of the proposed policy rejected in *Widmar*. Specifically, the ordinance permitted churches and similar religious bodies to conduct *worship services* in its parks, but it prohibited *religious meetings*. The ordinance resulted in the arrest of a Jehovah's Witness as he addressed a peaceful religious meeting. This Court held that the distinction required by the ordinance between *worship* and an *address on religion* was inherently a religious question and invited discrimination:

> Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Fowler, 345 U.S. at 69-70. As Justice Thomas stated in his concurring opinion in *Hosanna-Tabor*, "[j]udicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'Mainstream' or un-palatable to some." *Hosanna-Tabor*, 132 S. Ct. at 711 (Thomas, J., concurring); *see also id.* at 712 (Alito J., concurring) ("Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one.").

In short, a narrow definition which requires government officials to weigh all significant religious and secular characteristics to determine whether an activity or policy is sufficiently religious sets government officials adrift in a sea of subjective religious determinations which they have no competence or authority to navigate. Such a definition will inevitably produce arbitrary and discriminatory results.

B. Limiting religious exercise to exclusively religious activities improperly confines religion to the margins of civil society.

The premise that certain activities are secular and not religious if they are conducted by others for nonreligious reasons effectively secularizes a vast

array of religious activity. It would essentially mean, for instance, that six of the Ten Commandments (honor your parents and do not murder, steal, lie, covet or commit adultery – Exodus 20:2-17) are no longer religious because they have been widely embraced by society. The Third Circuit Court of Appeals in *Leboon* rejected an argument that a Jewish Community Center was not a religious organization because it promoted principles, such as tolerance and healing the world, which are shared by nonreligious persons. The court held that "[a]lthough the [community center] itself acknowledges that some of these principles exist outside Judaism, to the extent that [the community center] followed them as Jewish principles this does not make them any less significant." *Leboon*, 503 F.3d at 230.

The court in *University of Great Falls* also rejected this premise, affirming that a litany of "secular" characteristics of the University:

> . . . says nothing about the religious nature of the University. Neither does the University's employment of non-Catholic faculty and admission of non-Catholic students disqualify it from its claimed religious character. *Religion may have as much to do with why one takes an action as it does with what action one takes.*

278 F.3d at 1346 (emphasis added).

More recently, this Court in *Hosanna-Tabor* unanimously held that a teacher qualified as a minister

even though her primary duties consisted of teaching secular subjects. In rejecting the EEOC's argument that the religious exemption at issue in the case should be limited to employees engaged in "exclusively religious functions," this Court observed:

> Indeed, we are unsure whether any such employees exist. The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities.

Hosanna-Tabor, 132 S. Ct. at 708-09.

Indeed, even religious worship may encompass "secular" activities. In *Maurer v. Young Life*, 774 P.2d 1317 (Colo. 1989), the Colorado Supreme Court upheld a determination by the Board of Assessment Appeals that camp property owned and operated by Young Life qualified for a religious worship exemption. The court cited the testimony of Young Life's president that:

> To us, skiing, horseback riding, swimming, opportunities to be with young people in a setting and in an activity that is wholesome is all a part of the expression of God in worship. There is no ["]we are now doing something secular, we are now doing something spiritual.["]

Id. at 1328.

These cases affirm that purposes and activities are no less religious merely because some persons may embrace similar purposes or conduct similar activities for nonreligious reasons. Put differently, *religious purposes* cannot be limited to *exclusively religious purposes* (*i.e.*, only those purposes that could not be embraced for nonreligious reasons). To hold otherwise would mean that many organizations which believe as a matter of religious conviction that they are called to serve tangible human needs or even to engage in the commercial marketplace would be required to sacrifice their religious character in order to fulfill their calling. Such a result trivializes religious exercise.

C. Limiting religious exercise to nonprofit corporations fundamentally misconceives the distinction between corporate forms.

Finally, the Secretary's proposed blanket rule that no for-profit corporation can engage in religious exercise both denigrates religious exercise and undermines constitutional deference. First, almost all organizations (including all *amici*) are incorporated. In cases such as *Amos* and *Lukumi*, this Court has repeatedly protected the religious exercise of corporations. Therefore, securing the benefits of corporate status does not require surrendering religious liberty protection. Indeed, the Secretary concedes this much.

But the Secretary does not identify any inherent distinction between a nonprofit and a for-profit corporation that would conclusively preclude all of the latter from exercising religion. Instead, the Secretary merely asserts that no for-profit corporation can exercise religion because no court (except the Tenth Circuit in this case) has definitively held that they can.[5] Of course, any lack of case law definitively addressing whether for-profit corporations can exercise religion proves nothing about the answer to the question. It is merely a restatement of why the issue is now before this Court.

The Secretary also asserts, as if it were an axiom, that because for-profit corporations engage in commercial activities, they cannot at the same time exercise religion. This assertion entirely fails to comprehend the extent to which religion may direct the conduct of activities and the diversity of religious exercise. Indeed, many organizations (including some *amici*) engage in commercial activities, either directly or through for-profit entities, specifically to advance their religious mission. Among other things, such activities may include the sale of educational services

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[5] The Secretary incorrectly asserts that the exemptions for religious employment discrimination in Title VII do not include for-profit corporations. The Secretary fails to note the exemption applicable to all employers that applies when religion is a bona fide occupational qualification for a position. 42 U.S.C. § 2000e-2(e). Moreover, there is no case law holding that a for-profit corporation cannot qualify as a religious corporation under the Title VII organizational exemption.

or camping experiences, product sales and construction loans. Activities conducted through for-profit affiliates could include the funding, training and/or operating of micro-enterprises used to provide job opportunities in economically distressed areas, or the operation of cafes designed to reach out to demographic groups such as college students or business professionals, or small businesses that may operate in communities or countries where a conventional nonprofit religious organization may not be welcome.

The blanket exclusion also ignores the rules of deference and neutrality discussed above. Based on these rules, the proper inquiry for a court is to determine whether the applicable religious beliefs are sincerely held by the corporation (including, in this consolidated case, the belief that prohibits facilitating abortions by providing certain contraceptives in its healthcare plan). For this question, the only relevant difference between a nonprofit and a for-profit corporation is that the latter can distribute net earnings to shareholders and the former cannot. Bruce R. Hopkins, *The Law of Tax-Exempt Organizations*, § 1.1, Tenth Edition, 2011, John Wiley & Sons, Inc. There may be less reason to doubt that asserted religious beliefs are sincerely held when they support exclusively religious activities conducted by a nonprofit corporation in which no profits can be distributed to shareholders. And, indeed, a record of activities taken contrary to such beliefs to increase the profits being distributed to shareholders might undermine sincerity. But nothing about the "for-profit" structure of an

organization or its commercial activities inherently precludes it from sincerely holding and exercising religious beliefs in connection with its activities.

Because the blanket rule proposed by the Secretary evades the relevant question of sincerity and undermines the scope of religious convictions and diversity, this Court should clearly reject it.

III. The Coverage Mandate is subject to and does not survive the rigorous strict scrutiny standards designed to protect religious liberty.

The principles of religious deference and neutrality dictate not only a broad understanding of religious exercise, but also deferential standards to resolve disputes between religious exercise and civil laws. These standards include both a deferential determination of how a law may burden religious exercise and a strict interpretation of the general applicability requirement. They also require a rigorous application of strict scrutiny when triggered.

A. The Coverage Mandate is subject to strict scrutiny under RFRA because it substantially burdens religious exercise.

Determining what constitutes a sufficient burden on religious exercise in order to trigger strict scrutiny under RFRA (and the *Free Exercise Clause*) can raise difficult questions involving both the application of

religious doctrine to the actual requirements of the law and the nature of the burden imposed. In addressing these questions, courts should adhere to the principles of religious deference and neutrality discussed above. So, for instance, a court could determine whether the burden alleged by an organization is based on a correct understanding of the actual requirements of the law. But assuming the legal requirements are correctly understood, the court cannot second guess the organization's conclusion that such law requires the organization to act in violation of its religious beliefs. Further, although the substantial burden standard may not apply to laws that only burden religious exercise indirectly by making the activity more costly to perform, the standard must apply to any law that requires action that violates religious beliefs.

And there can be no doubt that this is what the Coverage Mandate requires. Indeed, the Secretary's "religious employer" exemption concedes that the Coverage Mandate can substantially burden the religious exercise of those organizations with religious objections to the use of some or all the required contraceptives. Alleviating this burden is the sole reason for this exemption. Moreover, the Secretary has conceded that the Coverage Mandate can burden the religious exercise of organizations not covered by the "religious employer" exemption. For some of these organizations, the Secretary has created a separate "accommodation" that purports to remove this burden

while providing contraceptive coverage for the eligible organizations' employees.[6]

The burden imposed by the Coverage Mandate and recognized by the Secretary derives in part from the fact that the Coverage Mandate conscripts employer healthcare plans to provide contraceptives. Because organizations are required to provide healthcare benefits, the Coverage Mandate requires organizations to participate in an overall scheme that uses their employer plans as a means of providing contraceptive coverage to the plan participants. Moreover, the Coverage Mandate relies on the economics of the employer group plan to fund the coverage of contraceptives.

This Court in *Amos* recognized that a religious nondiscrimination requirement creates "significant governmental interference with the ability of religious organizations to define and carry out their mission." *Amos*, 483 U.S. at 335; *see also id.* at 336 (noting that requiring an organization "to predict which of its activities a secular court will consider religious" imposes a significant burden and that "[f]ear of potential liability might affect the way an

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[6] The fact that the government has retained the "religious employer" exemption constitutes a tacit admission that the "accommodation" does not adequately remove the burden. If the "accommodation" did remove the burden, there would be no need to retain the "religious employer" exemption and with it the loss of contraceptive coverage for employees of "religious employers."

organization carried out what it understood to be its religious mission."). The Coverage Mandate burdens religious exercise in precisely the same way, significantly interfering with the ability of an organization to define and carry out its religious convictions. By requiring organizations to provide contraceptive coverage in direct violation of their firmly held religious convictions, the Coverage Mandate substantially burdens their religious exercise.

B. Because the Coverage Mandate is not generally applicable, it must survive strict scrutiny under the *Free Exercise Clause*.

In assessing the general applicability of a law, the U.S. Supreme Court has stated that "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. Part of the rationale underlying this concern can be stated as follows:

> First, the legislature cannot place a higher value on some well-connected secular interest group with no particular constitutional claim than it places on the free exercise of religion. Second, . . . if burdensome laws must be applied to everyone, religious minorities will get substantial protection from the political process. . . . If a burdensome proposed law is generally applicable, other interest groups will oppose it, and it will not be enacted unless the benefits are sufficient to justify the costs. But this vicarious political

> protection breaks down very rapidly if the legislature is free to exempt any group that might have enough political power to prevent enactment, leaving a law applicable only to . . . groups too weak to prevent enactment.

Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law. 25, 35-36 (2000) (footnotes omitted). *See also Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (holding that a ban on beards for police officers was not generally applicable since it provided an exception for medical purposes); *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996) (holding that a university policy requiring all freshmen to live in on-campus dormitories was not generally applicable since it included exemptions for married students, older students, and students commuting from their parents' home as well as for reasons such as familial responsibility, medical need, or emotional difficulties).

Because the Coverage Mandate includes exemptions that undermine its immediate objectives, it is not a generally applicable law. The Coverage Mandate includes exemptions for grandfathered plans, 42 U.S.C. § 18011, and plans of religious employers. In addition, the law does not provide cost-free access to contraceptives for members in a "recognized religious sect or division" that objects on conscience grounds to acceptance of public or private insurance funds, 26 U.S.C. §§ 1402(g)(1), 5000A(d)(2)(A) and (B), or for individuals who choose not to obtain health coverage and instead pay the applicable tax.

In the face of these exemptions, a holding that the Coverage Mandate is generally applicable would effectively eliminate this requirement. The result would be a test that only invokes strict scrutiny of a law if it targets religion, which is precisely what the neutrality requirement already covers.

C. The Coverage Mandate is not the least restrictive means of furthering any compelling governmental interests.

Because the Coverage Mandate substantially burdens religious exercise (and, for *Free Exercise* purposes, is not generally applicable), it is subject to strict scrutiny. And this Court has emphasized that the strict scrutiny test must be rigorous:

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests.

Lukumi, 508 U.S. at 546 (citations omitted).

Strict scrutiny first requires an examination of the interests furthered by the Coverage Mandate. In this regard, the focus must be on the immediate objectives of the law, such as facilitating cost-free access to prescription contraceptives. The government cannot assert a broad and abstract interest, such as

protecting employee rights in a broad statutory scheme or promoting gender equality, which when stated in such terms most people would agree are important and perhaps even "compelling" interests. Applying such broadly stated interests simply waters down the test.

Further, when a law is not generally applicable, it usually is not furthering a compelling governmental interest. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Gonzales*, 546 U.S. at 433, *quoting Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. 520, 547 (1993) (quotation marks and ellipses omitted). This is certainly the case with the Coverage Mandate. By creating a religious employer exemption (in addition to the grandfathered plan exemption and others), the Secretary has conceded that at least in some situations religious liberty interests (or certain political interests) should prevail over the interests furthered by the Coverage Mandate. If such interests were truly compelling, there would be no exceptions for these other interests.

Finally, the Coverage Mandate was only recently enacted by administrative regulation (not by Congress), and has not even been fully implemented yet for nonexempt plans. Therefore, it strains credibility to assert that the immediate objectives of the Coverage Mandate are interests "of the highest order."

Nor is the Coverage Mandate narrowly tailored to any such interest. As an initial matter, courts have repeatedly held that the government cannot satisfy its strict scrutiny burden with mere speculation. To the contrary, the government must present evidence to support its assertions. *See, e.g., Larson v. Valente*, 456 U.S. 228, 249 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 224-25 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995). The Secretary has no idea how exempting other organizations (in addition to those already exempt under the religious employer, grandfathered plan and other exemptions) will impact cost-free access to contraceptives for women who would choose to use them. The Secretary justifies the narrow religious employer exemption on the unfounded and entirely speculative assertion that church employees (and their families) are more likely to share their employer's beliefs than are employees (and their families) of other organizations. The Secretary has no data to support this assertion, and the speculation simply betrays an implicit, government-imposed understanding of churches and other organizations.

In addition, the Coverage Mandate is also clearly not the least restrictive means of accomplishing the government's objectives. Whether these objectives are stated in terms of cost-free access to contraceptives or promotion of health, there are clearly ways to accomplish these objectives that do not conscript organizations with religious objections into the program. There is no reason, for instance, that the government

must pursue these objectives solely through the structure of employer health plans (even if that may be a convenient approach). And even within the confines of the ACA, the Secretary has demonstrated ample capacity for regulatory creativity. The fact that the Secretary has limited the government's options to employer health plans reflect political considerations rather than a priority on religious liberty interests.

CONCLUSION

This country's constitutional commitment to religious liberty is necessarily humbling to civil authority. Broad religious liberty protection enforces the inherent limits of civil government. Just as importantly, it also fosters religious diversity and invigorates the marketplace of ideas. As this Court observed in *Yoder*, " . . . in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.'" *Yoder*, 406 U.S. at 223-24. This Court further noted that "[e]ven their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage." *Id.* at 226.

With the Coverage Mandate, the Secretary is sacrificing this commitment to religious liberty and the long-term benefits of religious diversity without

any compelling justification. For these reasons, *amici* respectfully request this Court to affirm a deferential definition of religious exercise and a rigorous strict scrutiny of laws that burden religious exercise.

Respectfully submitted,

STUART J. LARK
Counsel of Record
BRYAN CAVE LLP
90 S. Cascade Ave., Suite 1300
Colorado Springs, CO 80903
(719) 473-3800
stuart.lark@bryancave.com
Attorney for Amici Curiae